IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CONFIRMATION CASE NO. 1 OF 2004.
WITH
CRIMINAL APPEAL NO. 888 OF 2004.
WITH
CRIMINAL APPEAL NO. 889 OF 2004

CONFIRMATION CASE NO 1 OF 2004.

The State of Maharashtra ... Complainant.
V/s.
Sahebrao @ Navnath Sopal Kale ... Respondent
(Orig. Accused No.3)

CRIMINAL APPEAL NO. 888 OF 2004.

Saheb @ Navnath Sopan Kale,
R/at At and post Washi, Tehsil Bhuvan,
District Osmanabad,
(presently lodged at Yerwada Central
Prison, Pune-411 006) ... Appellant
(Orig.accused No.3)
Vs.
The State of Maharashtra. ... Respondent.

CRIMINAL APPEAL NO. 889 OF 2004.

Smt. Geetabai Bhagwat Kale,
R/at-At & Post Washi Tehsil Bhum,
Dist. Osmanabad,
(Presently lodged at Yerwada Central
Prison, Pune 411 006) ... Appellant.
Vs.
The State of Maharashtra. .. Respondent.
(Orig.Accused No.2)

Mrs. P.H. Kantharia and Mrs.U.V. Kejriwal, A.P.P. for the State in Confirmation Case No.1 of 2004- Appeal for the State of Maharashtra.

Mr. A.G. Toraskar, Advocate appointed for accused No.3 Sahebrao @ Navnath Sopan Kale in Criminal Appeal No.888 of 2004.

Mr. Abhay Kumar Apte, Advocate appointed for the

appellant in Criminal Appeal No. 889 of 2004.

CORAM : V.G.PALSHIKAR &
ANOOP V.MOHTA, JJ.
DATE : 11TH OCTOBER, 2004.

JUDGMENT (**PER ANOOP V.MOHTA**)

. The present confirmation case has been referred by the Additional Sessions Judge, Pune, in pursuance to the provision of Section 366 of Cr.P.C., as appellant-accused No.3 in criminal appeal No.999/2004 has been convicted under section 302 r/w section 34 of Indian Penal Code and sentenced to death.

2. The appellant-accused No.3 has also preferred the appeal against the order of conviction and sentence, whereby, he was convicted under Section 449,460,392,201,302 r/w section 34 of Indian Penal Code, along with appellant-accused No.2 in Criminal appeal No.889/2004. The learned Judge has sentenced to (undergo) imprisonment for life for the offence punishable under section 302 r/w Section 34 of Indian Penal Code to the appellant-accused No.2. However, for the same offence the appellant No.3 has been sentenced to death. Original-accused No.1 Bhagwat could not be tried as he is absconding. The operative part of the impugned judgment and order dated 20th January, 2004 in

Sessions case No. 368/1997, in question is reproduced as under:

> "(1) Accused No.2, Geetabai w/o Bhagwat Kale and accused No.3 Sahebrao alias Navnath son of Sopan Kale are convicted under Section 235(2) of Criminal Procedure code for the offence punishable under Section 449 r/w. 34 of I.P.C. and sentenced to undergo R.I. for ten years and to pay fine of Rs. 200 (Rs. Two Hundred) each. i/d. payment of fine they shall undergo R.I. for six months."
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> (2) Accused No.2 Geetabai Kale and accused No.3, Sahebrao Kale are convicted for the offence punishable under Section 460 r/w 34 of I.P.C. and sentenced to undergo R.I. for seven years and to pay fine of Rs. 200 (Rs. Hundred) each, i/d. payment of fine they shall undergo R.I. for three months.
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> (3) Accused No.2, Geetabai Kale and accused No.3, Sahebrao Kale are also convicted for the offence punishable under Section 392 r/w 34 of I.P.C. and sentenced to undergo R.I. for five years and to pay fine of Rs. 100 (Rs. One Hundred) each, i/d payment of fine they shall undergo R.I. for three months.
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> (4) Accused No.2, Geetabai Kale and accused No. 3, Sahebrao Kale are also convicted for the offence punishable under Section 201 r/w 34 of I.P.C. and sentenced to undergo R.I. for two years and to pay fine of Rs. 100(Rs. One Hundred) each i/d. payment of fine they shall undergo R.I. for two months.
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> (5) Accused No.2, Geetabai Kale is further convicted for the offence punishable under section 302 r/w 34 of I.P.C. and sentenced to undergo Imprisonment for life and shall pay fine of Rs. 1,000 (Rs. One Thousand) i/d. payment of fine, she shall undergo R.I. for one year.
>
> (6) Accused No.3 Sahebrao alias Navnath Sopan

Kale is further convicted for the offence punishable under Section 302 r/w section 34 of I.P.C. and sentenced to Death, he be hanged by the neck till he is dead.

(7) The substantive sentences imposed against accused No.2 Geetabai Kale shall run concurrently.

(8) However, the sentence of Death awarded to accused No.3, Sahebrao Kale shall remain suspended till its confirmation by the Hon'ble High Court, Bombay, as per the provisions of Section 366 of Criminal Procedure Code."

3. We have heard the learned A.P.P. Mrs.P.H. Kanthari and Mrs. U.V. Kejriwal for the State and the learned Advocate Mr.A.G. Toraskar for Sahebrao Kale-appellant-accused No.3 and Mr. Abhay Kumar Apte for appellant-accused No.2.. The respective appellants have challenged the order of conviction by these appeals separately. We have gone through the common testimony, as recorded in Sessions Case No.368/1997 and the record of the proceeding with the assistance of the advocates appearing for the parties. As consented and to avoid repetition of the facts and the basic testimony and evidence on the record, we have heard the present Confirmation case No.1/2004 along with these appeals.

4. The prosecution case is as under;

. **FACTS:-** The date of incident was intervening night between 15th May,1997 to 16th May, 1997. The place of incident is, residential complex at Princetone Town, Plot No. 73 at Kalyaninagar, Pune. The name of the deceased persons are Ramesh Patil, Vijaykumari Patil, Manjunath Patil and Pooja Patil. Deceased Ramesh Patil came to Pune from Belgaum on 9/5/1997 along with his wife deceased Vijayakumari and their children deceased Pooja (daughter) and Manjunath (son) and stayed in room No.310 of Ashirwad Hotel near Railway Station, Pune. On 10/5/1997 deceased Ramesh Patil approached one Smt. Jayshree Chitre, a Estate Agent, P.W. 1, for getting rented accommodation in Pune. On 11/5/199,7 after performing Pooja in the flat No.4 in the C-1 building at Prinston Town, Kalyaninagar, in question, they started to reside from 12/5/1997. The deceased Ramesh and his deceased wife had purchased various luxurious items like fridge, T.V. set, furniture etc. during the period from 12/5/1997 to 15/5/1997. These luxurious purchase and the life style of the deceased were noticed by the people in the vicinity of Prinston Town, apart from the accused 1 to 3, who were working as labourers at Prinston Town, Kalyaninagar, Pune. Accused No.1 Bhagwat Kale, is the husband of appellant-accused

No.2 Geetabai Kale, and cousin brother of appellant accused No.3 Sahebrao. The accused No.1 Bhagwat was doing the work of filling the overhead tanks of the buildings in Prinston Town, Kalyaninagar, Pune. He was also doing the minor electrical work. Accused No.1, therefore, was well acquainted with all the flats and buildings of that area. Accused No.3 Geeta was working as maid-servant in the flat occupied by the deceased Ramesh Patil and his family. The appellants and the accused No.1 were working as a labourers on 15/5/1997, during the day, at the site in question of Princton Town, Kalyaninagar, Pune.

4A). On 16/5/1997 at about 10.30 a.m. when the complainant, P.W. 1 , Jugraj Palrecha had visited the said construction site, P.W. 37, Sheshmal Bagmal informed that the electrical lights and fans of the flat No.C-1/4 of deceased Ramesh Patil were on. The complainant therefore, called to the deceased Ramesh Patil and his family. But there was no response from the said flat. The complainant therefore, asked P.W. 9, Gurunath Sutar, to climb on the terrace of the flat of the deceased Ramesh and see and verify the reason through the window. P.W. 9, Gurunath therefore, had

climbed on the terrace of the flat by help of the ladder and noticed the blood stains on terrace of the flat and therefore, informed the same to the complainant and others. The complainant, Jugraj along with his partner Subhash Sankla and agent, P.W. 1, Jayshree Chitre and others approached to Yervada, Police Station, Pune and informed to the police officials accordingly. The Police officer, along with complainant, P.W. 2, Jugraj and others arrived at the place of incident. The police officers along with the complainant and others climbed the terrace of the flat, occupied by the deceased Ramesh Patil with the help of ladder. The door of the terrace was opened. They entered into the said flat through the said door and noticed a lady, aged about 48 years and a boy aged about 10 years lying dead in the pool of blood in the said, flat. The house hold articles and other items were scattered in the flat. They found the knife and screw driver stained with blood, lying in the hall. They found knife and G.I. pipe also stained with the blood lying near the door of a bed room in the said flat. The police had opened the main door from inside and found a newspaper kept hanging to the latch of the door. The deceased Ramesh and his daughter were not found inside the flat. Therefore, the police officers

and others inspected the surrounding place of the flat. They found the dead bodies of the deceased Ramesh Patil and his daughter lying into a chamber towards east side of the said flat. One black cloth which was tied with the lid of the chamber was also noticed by them. Thereafter, they noticed one more G.I. Pipe stained with the blood lying at the first step of the ground floor. The complainant, therefore, had lodged complaint to P.I. Shamrao, P.W. 57 and P.I. Dhulumbhulu recorded the complaint Exh.62. The spot panchanma Exh.76 was drawn and articles knives, G.I. pipes, screw driver and two pieces of teeth stained with blood were seized from the spot. The blood samples were collected from various places of the incident. The bed sheets, plastic cover, mosquito net, turkish towel, black cloth, which was tied to the lid of the chamber in which amount of Rs. 4700/- was found and a ladder, found near the place of the incident, were seized under the said panchanma Exh.76. The forensic mobile squad had collected blood stained from the place of the incident. They also photographed the spot. The dog squad was called. Various documents found in the flat were seized under the panchanma. Some officers were sent to Karnataka for collecting more information about the

deceased persons. The bodies of the deceased persons were sent to Sasoon hospital for conducting the post mortems.

5. The appellants along with accused NO.1 were missing from their hut and had not attended their routine work. Accused No.1, Bhagwat Kale was arrested on 25th May, 1997 near village Wagholi, District Pune. Appellant-accused No.2 Geetabai and appellant-accused No.3 Sahebrao were arrested on 22/5/1997 and 24/5/1997 respectively, at village Washi by police. Various articles were recovered from all the accused. The cash amount of Rs. 3,49,600/-, a shirt, polythene bag in which resin purse containing ornaments of gold namely goth, necklace were recovered under seizure pachanama Exh. 150. From accused No.1 amount of more than forty lacs rupees were seized as per the information supplied by him. A shirt and pant stained with the blood were seized from the appellant-accused No.3, Sahebrao, Exh.109

6. Accused No.1 Bhagwat Kale and accused No.3 Sahebrao had escaped from the police, when they were being taken to Central Prison, Yevada from the Court.

The police have succeeded in arresting Sahebrao appellant-accused No.3. The accused No.1 is still absconding. Therefore, the trial proceeded only against appellants-accused No.2 and 3.

7. On 5/2/1998 charges were framed and the same were denied by the appellants-accused. The charges were amended on 8/5/2000 also.

8. The prosecution has examined 55 witnesses and proved about 227 documents on the record through the respective witnesses/testmonies.There was no defence witness. There are no eye witnesses to the incident. The whole prosecution case is based on the circumstantial evidence.

9. **DETERMINED POINTS :-** The learned Judge after considering the testimonies of the prosecution witnesses, as well as, proved documents, held that; the deceased Ramesh Patil, Vijayakumari, Pooja and Manjunath died of homicidal death on the night intervening between 15/5/1997 to 16/5/1997; the appellants-accused Nos. 2 and 3 along with absconded accused No.1, Bhagwat Kale in furtherance of their common intention jointly have

committed house tress pass by house breaking and voluntarily caused death of the deceased named above; They have committed the offence of murder or caused deaths by means of knives, suras, G.I.pipes, screw driver; They have in furtherance of their common intention committed robbery of cash more than Rs. forty lacs, ornaments of gold, silver coins, purse containing cash of Rs. 1,35,900/- which was the property in possession of the deceased Ramesh Patil. It has been also held that after committing the offence of murder and robbery, they destroyed the evidence of that offence or caused to wipe out the evidence of the offence by putting the dead bodies of Ramesh and Pooja Patil in drainage chamber with intention of screening away themselves from legal punishments. The impugned judgment and order, as referred above has been passed accordingly.

10. " CONFIRMATION OF THE DEATH PENALTY":-The first and foremost issue is the confirmation of the death sentence, as imposed/inflicted and as, contemplated under the provisions of Section 354 and 361 to 366 of Code of Criminal Procedure (Cr.P.C.).

11. The learned Judge principally has relied on (1) State of Rajasthan, V, Kheraj Ram, 2003 S.C.Cases (cri), page 1979= 2003 (8) S.C.C.224.

(2) Bachansing V. State of Punjab, A.I.R. 1980 S.C. 998

(3) Machansing V. State of Punjab, in 1983 S.C.C. (Cri) 681 = A.I.R. 1983 S.C. 957

The main case, State of Rajasthan V. Kheraj Ram (Supra) has been relied upon for the death penalty on the foundation that the facts and circumstances were quite similar with the present case. Factually this is not correct. We have to scrutinise the facts of each case. The appex Court in Simon and others Vs. State of Karnataka, (2004) 2 S.C.C. 694 has considered the basic judgments pertaining to the imposition of the death penalty by elaborating the connected principle of "rarest of rare case" and "mitigating circumstances." Para 33 of the same judgment is reproduced as under;

> "In Machhi Singh V. State of Punjab this Court has observed that one of the categories of rarest of rare case may be when the collective conscience of the community is so shocked that

> it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. Further, when the crime is enormous in proportion. For instance, when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality are committed. It was observed that in order to apply the guide-lines, inter alia, the following questions may be asked and answered: (SCC p. 489, para 39)
>
> "(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

The Court further said: (SCC p. 489, para 40)

> "40. If upon taking an overall global view of the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so."

The Apex Court in Rampal V. State of U.P, (2003) 7 S.C.C. 141, has already taken note of above principle and on facts, after considered the mitigating circumstances, the death penalty was substituted to

imprisonment for life. The relevant extract of para 9 is as under;

> "The abovenoted circumstances which we consider as mitigating circumstances, in our opinion, outweigh the aggravating circumstances as found by the courts below. In the said view of the matter, we think it appropriate to allow this appeal and in substitution of the sentence of death awarded to the appellant, we sentence the appellant under Section 302 read with Section 149 IPC to undergo imprisonment for life.(emphasis added)

The Apex Court in Suresh Chadnra Bahri V. State of Bihar, AIR 1994, S.C. 2420, had converted the death sentence into life imprisonment by observing in para 107 as under;

> This brings us to the question of sentence to be awarded to the appellant Raj Pal Sharma. There is no doubt that there is ample evidence of his active participation int he murder of Urshia as well as in the murder of two children but the prosecution evidence is silent about the actual part that he played in the two murders and the manner in which he acted in the said killings. It is difficult to take a definite view that the part he played in said killings was cruel and callous or it was the appellant Suresh alone who took the leading part and did the whole thing by himself while the appellant Raj Pal Sharma assisted him in one or the other manner. In such a situation, in our opinion, it would not be proper to inflict the extreme penalty of death to Raj Pal Sharma also but in the facts and circumstances of the case the sentence of life imprisonment will be just and proper sentence. We, therefore,e commute his sentence of death also into a sentence for life

> imprisonment and modify the judgments of the two Courts below accordingly."

. The Apex Court’s decision,(State of Rajasthan V. kheraj Ram) (Supra) as relied by the trial court itself has observed as under.

> "Section 302 IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the Court as to its applications. The changes which the Code has undergone in the last three decades clearly indicate that Parliment is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for "special reasons", as provided in Section 354(3)."
>
> "It would not, therefore, be wrong to assume that the personality circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors. Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.
>
> "A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised." (emphasis added)

Therefore, our task is now to see whether there are

"sufficient causes or reasons" to confirm "the death penalty", as imposed by the learned Sessions Judge and whether this is a " rarest of rare case."

12. "RAREST OF RARE CASE" FOR "DEATH PENALTY" AND "SUFFICIENT CAUSE":-We have to follow the basic ingredients, which, emerges from the settled principle of doctrine of "rarest of rare case" and "sufficient cause" as contemplated under Cr.P.C. for proposing and confirming death penalty. All the sides of this aspects of confirming the death penalty have to be scrutinised with great care and cautious. The "mitigating circumstances", always play dominant role in confirming the death sentence. The mitigating circumstance has to be gathered and or collected and to be weighed from the facts and circumstances of the case. The confirmation of death sentences therefore cannot be based only on the precedents and or aggravating facts and circumstances of any other case. The essential and relevant mitigating circumstances of the particular case always plays a role of negative elements against the positive theory of death punishment. Therefore, we have re-appreciated and re-assessed the facts and circumstances of this case for all the purposes.

13. In the present case, admittedly, there are no eye witnesses. The whole conviction is based on circumstantial evidence. The accused No.1, from whom more than 45 lacs cash had been recovered is absconding. The trial proceeded only against the appellants- accused No.2 and accused No.3. Accused No.3 has only been sentenced to death. Accused No.2 Geetabai was pregenent at the relevant time and has delivered a child, who is now of more than six years.

14. The prosecution has proved through the respective witnesses from P.W. 1 to P.W. 57, all connected circumstances to pin point that the appellants along with accused No.1 have committed the offence and no one else.

15. **THE CICUMSTANTIAL EVIDENCE IS LINKED AND THE PROSECUTION HAS PROVED THE CASE AS UNDER:- P.W. 1, Jayshree Chitre, an estate agent has deposed to support the prosecution to the fact that the flat in question owned by P.W.3, Mohan Lacchiram Lunawat was rented through her, being an estate agent. P.W. 3 Mohan L. Lunawant, has supported the same and further deposed**

that on 10th May, 1997 the deceased along with his family visited him for the flat. 16. P.W. 2, Jugraj Palrecha, had lodged the basic complaint Exh.62. He has deposed that being the builder and promoter of Nandraj Builders, Pune, he used to visit the site in question regularly along with his staff, since 1997. He has deposed that Mr. Raje was working as the supervisor in the said project. The workers were residing at the site and some of them had constructed their huts near the parking lot. This witness has also been corroborated P.W. 1 and P.W. 2. On 11/5/1997 deceased Patil and his family had taken possession of the flat and lease agreement was executed on 12/5/1997. P.W. 2 has deposed that the accused No.1 and the appellant-accused No.3 were doing labour work on the site till 16/5/1997. On information from one electrician (P.W.37) Sheshmal Bagmal that there was no response from the flat of deceased Ramesh Patil. and one rickshawalla was also waiting for opening the said door of the flat, therefore, P.W. 2, who was sitting in his office in the building NO. C-2, which is adjoining to the building C-1. had directed one of the labourer (P.W.9) Gurunath Suttar to go to the terrace and see inside the flat. Gurunath Sutar had fetched one ladder and with the help

of it he went to the terrace. He immediately informed about the spreaded blood stains on the terrace He had also noticed blood stains on the parapet wall of the terrace and blood stains near the drainage chambers. Therefore, he had called Mrs. Jayshree Chitre and Subhash Sankla. All of them went to the police station, Yeravada and informed accordingly. The police officers had made entry in the Station diary and asked them to go back at the site. Two police constables visited the site and with the help of a ladder, these two constables climbed on the terrace, P.W. 2 had also followed them. Both these police constables along with P.W. 2 had entered in the flat through the door of terrace. They saw the dead body of Mrs. Patil lying in the passage, leading to the terrace. They also saw the dead body of the son, the deceased Manjunath lying on the bed in a pool of blood, in the bed room. The furniture and articles were scattered. The steel cabinet was raffled. Those two constables waited in the flat. P.W. 2 saw one screw driver and two knives, lying in the bed room, stained with the blood. They saw corrugated iron pipe near the room and one in the stair case, stained with blood. The F.I.R. Exh.62 has been duly proved by these witnesses. P.W. 2 knew all the accused as they were

working on their site as a labourers. The accused NO.1 was also employed to fill the water tanks with the help of electric pump and therefore, he was aware of the situation of each and every flat. He has also deposed that the accused Geetabai and her family members were staying in the hut opposite to the building in question on the ground floor. Another labourer (P.W.12) Uttam Phere was also staying in the adjoining premises along with accused family. The accused and her family members were used to sleep on the heap of the sand, lying near the huts, during the summer season, so also family of Uttam. P.W. 3 has also produced the muster role and pay/salary register of the labourers to prove that on 15/5/1997 the accused were present and working on the site. This witness has deposed that on 16/5/1997 the accused were absent from the work. Uttam Phere neighbourer of the accused told that they had left the site in the early morning on 16/5/1997. This witness has also answered in the cross-examination, that they had day and night watchman for the site. P.W. 2 has deposed that the distance between C-1 and C-2 buildings is about 20 feet. and the distance between A building and C-1 building is about 50 to 60 feet.This witness further supports the prosecution that the deceased Patil

was always in the company of one rickshaw driver. He had noticed that on 15th May, 1997 the electric fans and lights in the flat of deceased Patil were on and as same could be noticed by standing on the ground through the window of the flat. This witness P.W. 2 had noticed one ladder, which was kept near the window of the flat of the deceased. P.W. 2 had visited the whole flat along with the police and saw the scattered articles and blood stains in every part of the bed room passage and terrace. P.W. 2 has deposed that the police brought sniffier dog to the spot. The dog unit went towards the residential place of accused Bhagwat Kale.. P.W. 2 has also deposed that all these three accused were seen together. He knew them, as they were working on this site till the date of the incident and they were working on 15th May, 1997, till 7.30 p.m. The evidence of this witness remained unshattered.

17. P.W. 5, Shantilal, a social worker has proved the panchanma Exh. 85 of 48 articles seized on 16/5/1997 from the bed room and flat No. C-1-4.

18. P.W. 4 , Subhash Dhanraj Sankala has deposed that he is the architect, builder and partner of the

concerned firm, Nandraj builder. He has proved the scene of the offence Exh.76 being a panch witness to the same. P.w. 4 has fully corroborated the testimony of P.W. 2 in all respect. He has deposed that on 16/5/1997 at about 3.30 P.M. he was called for the panchananma. He had identified an iron pipe with the blood stains. At the entrance of the flat, he saw one screw driver with blood stains, scattered articles in drawing room, he saw that the window of the bed room was half opened having 6 X 3 feet size. The fans and lights were on of the bed room. He has also deposed that the blood was found on the bed and the wall. The earings and the knife with the blood stains were also found on the bed. The steel Almirha was in the bed room, which was facing the window. The articles from steel Almirha were scattered. The blood marks were found on galvanized pipe resting against the wall. A dead body of one boy was found on the bed with bleeding injuries. The bed sheet was also stained with blood. One single bed was also stained with blood. One dead body of a woman was also lying in the passage with multiple injuries. The blood was also noticed in the passage with dragged mark. A new boiler which was not fixed in the room was lying there. He has deposed and described

the size and situation of the terrace. He saw the blood in the terrace with dragged marks. He has corroborated the facts about the forensic mobile van, photographers and finger print experts. The dog squad was also present. The photographs of the scene of the offence were taken by the photographers. The technicians had collected all the material samples. The photographic print experts had examined, the knives and other articles and collected the photographic prints from the steel Almirha. P.W. 4 has deposed, that he found open manholes of the septic tank. One manhole was half opened and the lid of the same was lying near it. One black cloth was tied to the lid of the manhole. The cloth was blood stained. Some cash were found in the cloth. The blood sample from the manhole was also collected. Two dead bodies were found in the manhole, one of the deceased Ramesh and another of his deceased daughter. The blood stained water from the chamber was also collected. The ladder was also found near the window. The panchanama was drawn accordingly, which was duly proved by P.W. 4. He has identified and proved the prosecution case, including the related exhibits and articles. P.W. 4 has also deposed that on 15th May, 1997, all three accused were working on the construction

site. He had identified the article 42, which was used by the accused as a cloth of ring, to carry heavy articles on the head. P.W. 4 has described in detailed the location of the site, which was corroborated by other witnesses. P.W. 4 has deposed that the accused were living in the parking place of C-5. He has also deposed that one Uttam Phere (P.W. 12) was neighbourer to the accused. P.w. 4 has also deposed that the windows were to the northern side of the flat of the deceased. The windows of the flat of deceased Patil were 12 feet height from the ground level of parking place. There were windows to the northern side of the flat No.3 in C.-1 building. The septic tank was adjacent to the C-1 building. P.W. 4 has corroborated that on 16/5/1997 after the incident he was called by his partner P.W. 2 and they went to the police station for lodging the complaint. He has further deposed that the Police Inspector and constable came to the construction site. P.W.4 had also witnessed that fans and electric lights were on in the room. He has corroborated the description and testimony of all other witnesses, basically of P.W. 1 to 4.This witness has also remained unshattered. and therefore the panchanma Exh.76 has been duly proved apart from other

corroboration as referred above.

18A. P.w. 5 Shantilal Bhatewara a Social Worker has proved the panchanma Exh.85 of the articles 48 seized on 16/5/1997. P.W. 5 therefore, has also proved and identified the articles seized under panchanama Exh,.85. Those 48 articles were seized on 16/5/1997 at about 7 p.m., on the spot in flat No.4 of C-1 building. These articles includes blood stained two knives, one screw driver from the bed room and hall, respectively. One iron pipe was also identified by this witness.

19. P.W. 6 Subhash Adhav, a rickshaw driver, who has deposed and corroborated the prosecution case that deceased Patil had hired one rickshawala to ply, in the city for various purchases from 12th May 1997. The deceased used to engage him from 9 a.m. to 9.30 p.m. and gave him sufficient money towards the hire charges. P.W. 6 has also deposed that the deceased was rich person. This rickshawala used to park his rickshaw near C-1 building in question. There was no response when he had visited on 16th May, 1997, the flat in question. P.W. 6 has deposed and described the area and site in question and corroborated the prosecution case. He had

also seen the newspaper on the door, when he went to the flat of deceased Patil, through the stair case, on 16th May,1997 at about 9.30 to 10 a.m. On 16th May, 1997 at about 12.30 p.m. he had parked his rickshaw near the gate of watchman cabin. P.W. 6 has deposed that on 15th May, 1997 at about 3.30 p.m. to 8 p.m., he had visited various places with deceased Patil in his rickshaw. Only after reading the newspaper about the death of the deceased, on 18th May, 1997, he visited the police station.

20. P.W.7, Raju Jadhav, a watchman corroborates being a panch witness to Exh.90, that there was nothing found in the room of accused except some articles. The locked room was opened with the help of the key maker.

21. P.W. 8 Suresh Garad, the owner of the hotel at Hadapsar on the road which joins Solapur road via Magapatta road,Pune, from where accused Geetabai had purchased snacks for the break fast on 16/5/1997 in the morning hours. This witness has identified the accused Geeta, as she was the first customer on 16/5/1997.

22. P.W.9 Gurunath Sutar, a Carpenter who at the

instance of P.W. 2 and others went to the terrace of flat of the deceased with the help of ladder. This witness therefore, has corroborated P.w.2 to 4. P.W. 9 knew the accused persons being carpenter of the site in question.

23. P.W. 10, Dilip Jadhav, another rickshaw driver, who left the accused persons from Mundhawa rickshaw stand Pune to S.T. stand on Solapur road, Pune on 15/5/1997. This witness has identified all the accused, carrying two bags of blue colour and one bag of green colour. This witness has identified these bags also. P.W.10 has further deposed that he had carried all those accused in his rickshaw up to the S.T. stand of Solapur road, where all these accused alighted from the rickshaw with the luggages in question.

24. P.W. 11,Ratan Uttam Phere, a labourer working on the construction site, who knew the accused persons, the wife of P.W. 12 Uttam, has further corroborated that the incident took place in the midnight between Thursday and Friday when they were sleeping in open land on the heap of sand which was about 20-30 feet from their residence place. She was in the room about 1 to

1-1/2 hours with her husband for sex. They came out of the room to sleep on the sand again.At that time the family members Tulshirim and Sayalu were found sitting on the sand. Therefore, when enquired, Tulshiram immediately silenced them. P.W. 11 has deposed that lights of flat of the deceased Patil were on and the accused No.1, Bhagwat Kale was inside the flat, he was opening the almari visible from the window. She has deposed that window of the deceased Patil was half opened. She also saw the ladder below the window. P.W. 11 had deposed that she saw the accused Bhagwat Kale came out from the flat through the stair case. The accused Bagwat Kale offered money to Tulshiram, but Tulsiram had refused to accept. Therefore, Bhagwat Kale had asked her husband to take money and not to disclose anything to anybody. He threw money on the sand and her husband had collected the currency notes. Thereafter, they went towards their room. The accused Bhagwat Kale went towards the flat. Accused Bhagwat Kale again came and demanded crow bar or a bar from Tulshiram for opening the chamber of drainage. This witness has deposed that he had also requested Tulsiram to assist in opening the chamber of drainage, which he refused. The accused Bhagwat Kale had said that he wanted to keep

dead bodies in the drainage chamber. After 15 to 20 minutes accused Bhagwat Kale and Sahebrao Kale came towards their room and asked them water to clean hands Thereafter, all the three accused had changed their clothes and went away and locked the room. She has deposed that she saw one iron pipe at the foot of stair case of the flat of the deceased, when she was proceeding to answer the natures call. She has corroborated that at about 9 to 9.30 a.m., one rickshaw driver came there. Sankala and Palrecha also came there. This witness has also deposed that on the previous day till the evening, all the accused were working with them and on the next day all the accused were absent from the work. This witness has also narrated the presence of the police and the recording of the statement on 20th May, 1997. This witness has also identified the black cloth which was tied to the lid of the drainage chamber, article 42. This witness has also described the area and the situation and surroundings of the flat in question and supported the prosecution case fully. P.W. 11 has also deposed that accused Geetabai Kale was visiting the flat of the deceased, as a maid servant and she saw accused Geeta Kale drying the clothes of the deceased family . This witness has also

admitted that her husband had accepted those currency notes thrown by the accused. This witness has further deposed that on 15th May, 1997 in the night, when they went to sleep on the open space, at about 9 to 9.30 p.m., at that time electric fans and lights ofthe flat of the deceased Patil were on. At about 10 p.m., she saw the deceased Patil and two children in their flat. At about 12 midnight her husband took her to the room for sex and at that time the lights were on in the said flat. The distance between sleeping place (heap of sand) in question and flat of the deceased Patil was about 50 to 60 feet. This witness has fully supported the prosecution case and narrated the whole action and activities of the accused at the relevant time Nothing could be shattered this witness from any aspect. This witness has fully supported the prosecution case which has linked the involvement of all the accused. This testimony further shows the presence of the accused in the flat and all other related and connected circumstances, to support the prosecution story about the involvement of the accused in the commission of the crime in question.

25. P.W.12, Uttam Narsu Phere, another labourer

working on the construction site in question to whom the appellant-accused No.1 had offered money. P.W. 12, is the husband of P.W. 11 Ratan. This witness also supports and corroborates with P.W. 11 in all aspect, P.W. 12 has deposed that the accused Bhagwat Kale had demanded iron bar and requested to assist him. However, this witness had refused to assist him. This witness has further deposed that the accused Bhagwat Kale had demanded iron bar to open the drainage for keeping money and dead bodies in the drainage. Accused Bhagwat Kale left the spot and returned after 15 to 20 minutes. All the accused came out of the room one after another. This witness has deposed that thereafter, all the three accused left the spot. P.W. 12 has deposed and corroborated the story and deposition of Raju Supervisor and (P.W.4) Sankala. This witness has answered in cross-examination that the drainage chamber can be visible from the heap of sand. This witness has deposed that the lights and fans in the flat of the deceased were on, at 10.00 p.m., on 15/7/1997. One rickshaw driver used to come in the morning time to the deceased Ramesh Patil, every day. This witness has also stated that when they came out of the room after sex with P.W. 11, at about 1.30 a.m., P.W. 11 asked her mother as to

what happened, when she saw that his family members were sitting on the heap of the sand. The lights and fans in the flat of the deceased Patil were still on and window was half opened. This witness saw the ladder at the wall of the flat and accused Bhagwat was opening Almera in the flat of the deceased Patil. The accused Bhagwat Kale was having black cloth around his head. Thereafter accused Bhagwat Kale came towards them from the stair case of the flat of the deceased Patil. He told Tulshiram not to disclose the incident to any body. The accused had also offered amount to Tulshiram, saying that the crime had been committed by them. The said Tulshiram had refused to accept the money. Therefore, Bhagwat Kale threw the money on the heap of the sand. He had threatened Tulshiram to disclose the incident. This witness P.W. 12 has admitted to have collected said money out of fear thrown by the accused Bhagwat Kale. This witness has further deposed that Almera was in the bed room of the deceased Patil of grey in colour and the same was visible even after sleeping on the heap of sand, because the window of the flat of the Patil was half opened. He has further deposed that he saw from the ground level accused Geetabai in the flat of the deceased, going towards the building of the deceased

Patil. This witness however admitted that they did not see accused giving blows to the victims in the flat.

26. P.W. 13, Sandeep Uttam Phere,who knows the accused persons, who is the son of P.W. 11 and 12, also corroborates the testimony of P.W. 11 and 12. This witness P.W. 13, Sandeep has also identified the clothes of the accused Sahebrao. This witness had also noticed all the activities as narrated by P.W. 11 and P.W. 12 of all the accused and specially of Bhagwat and Sahebrao.

27. P.W. 14, Hanumant Kisan Pisal, who was panch witness to Exh.107, has deposed and proved the seizure of blood stained clothes of accused No.3 Sahebrao Exh. 108 and 109 and also the statement made by accused No.3.

28. P.W. 15 Sanjay Pille has proved Exh.112 regarding the personal search of accused No.2.

29. P.W. 16, Sanjay Rathod was working as a room boy in hotel Ashirwad at Pune and has supported the prosecution that the deceased along with the family stayed in hotel Ashirwad.

30. P.W. 17,Shaikh Gulam, who was working as a driver with Ashirwad hotel, has deposed, that he took deceased Ramesh Patil and his family members in Maruti Van to flat No.C/1-4 at Princeton town.

31. P.W. 18, Hussain Khan has proved the inquest panchanama, Exh.117.

32. P.W. 19,Balasaheb Ghule, panch witness for the seizure of the clothes of the deceased Ramesh Patil Exh.119.

33. P.W. 20, Shashikant Shinde was present at the time of inquest panchanama of the dead body and who had produced recovered articles and clothes of the deceased.

34. P.W. 21 Sunil Kulkarni, a Police Constable, one who had seized the clothes and ornaments from the person of deceased Pooja.

35. P.W. 22, Narayan Partale, Police Nayak, attached to Yervada Police Station, who was present at the time of inquest panchanma of Vijakumari Patil.

36. P.W. 23, Sanjay Talekar,another police constable, who was present at the time of inquest of deceased Manjunath Ramesh Patil.

37. P.W. 24, Dr. Shrikant Chandekar, who has conducted post-mortem of the victim son and daughter of deceased Ramesh Patil (P.M. Notes Exh. 126 and 127).

38. P.W. 25, Dr. Rajendra Bangal, who had conducted post mortem of deceased Ramesh Patil and his wife Exh. 130 and 131.

39. P.W. 26, Vishnu Rammughade and P.W., 27, Ambarnath Bhosekar have proved the panchanama of seizure of clothes and ornaments of deceased Pooja and Vijayakumari.

40. P.W. 28, Bapusaheb Salunke, Prist of Tuljabhavani Temple, at Tuljapur, has deposed that he had performed religious rites in respect of accused Geetabai and her husband.

41. P.W. 29,Bharat Kewale, driver of Luxury bus,

has deposed that accused persons had travelled in his luxury bus from Pune to Solapur.

42. P.W. 30, Surayakant Jadhav, conductor of Mini luxury bus, has supported the driver's deposition and has deposed that he also saw one big bag articles 156 and other two bags, muddemal articles 136 and 141.

43. P.W. 31, Rajeshkumar Dhoot, who was running a shop named Jay Jaywanti Cloth Centre, has deposed that the deceased had purchased various material for curtain and also asked to stitch the same.

44. P.W. 32 Kailas Punjabi, owner of Supriya Furniture shop, has supported the prosecution that the deceased had purchased various furnitures and fixtures for the flat.

45. P.W. 33, Prabhakar Ganpat, a recovery panch to the recovery from accused Geetabai, including currency notes of worth Rs. 3,50,000/- and gold articles worth Rs. 42,000/-, Exh.149 and 150.

46. P.W. 34, Abdul Korbu, who was attached to Washi

Police Station, Dist.Osmanabad, has stated that he has seized cash and gold ornaments from accused on 22/5/1997, in presence of panchas and arrested Saheb Navnath Kale, on 24/5/1997.

47. P.W. 35,Shekhar Shinde, P.W. 36, Madhav Kshirsagar, P.W. 37, Sheshmal Bagmal, P.W. 39, Sandip Pathan have deposed and proved that the deceased had purchased various sound systems, furnitures and other articles from them.

48. P.W. 38, Vijaykumar Raje has supported the prosecution that accused Bhagwat Kale, Sahebrao Kale and Geetabai Kale were not present and he reported about their absence to P.W. 2, Jugraj.

49. P.W.40, Pramod Joshi, Photographer, has proved the photographs of the dead bodies in the flat in question Exh.170.

50. P.W., 41, Anil Mali, a member of the dog squad and who was working as a dog handler under Commissioner of Police, Pune, has proved the dog squad report Exh.172.

51. P.W.,42, Sharad Kshatriya, a Police Photographer, who took photographs of various articles lying on the spot of occurrence including of dead bodies and a ladder found on the northern side of the window of the flat Exh.177.

52. P.W. 43, Sakharam Choudhari has proved Exh. 180.

53. P.W. 44, Arvind Nargund, a resident of Belgaon had stated that he took deceased and his family from Karnataka to Pune on 9/5/1997.

54. P.W. 45, Deepak Wali, P.W. 46 Pradeep Raikar, P.W. 47, Netaji Kawalekar, P.W. 48, Chandrakant Patel, resident of Hubli have deposed that they gave financial assistance to the deceased and in return deceased had issued the cheques to them and those cheques were dishonoured.

55. Other witnesses from P.W. 50 to 52 have supported the various links of the prosecution, chemical analysers reports etc.

56. P.W. 53, Satish Govekar, A.P.I., Police Station Pune, who had been directed to proceed Bhum; District Osmanabad for getting transfer warrant of accused.

57. P.W. 55, A.P.I., who was working at relevant time as P.S.I., Yervada Police Station who removed the dead bodies of deceased from the flat and visited Ashirwad, Hospital, Pune to ascertain the stay of deceased in the said hotel and further proceed to Banglore in search of the parents of the deceased Patil.

58. P.W. 56, Gajanan Suddekar, had assisted in the investigation with P.W. 57, Shamrao Dhulubulu, Dy.S.P., C.I.D. Crime Pune.

59. The list of the documents and panchanamas placed on record and duly proved by the respective witnesses as referred above, according to us left no doubt that the accused had committed the offence in question and no one else.

60. **THE CUMULATIVE EFFECT OF ABOVE EVIDENCE:-** By the testimonies of the witnesses as referred above, the

prosecution has further proved and placed on the record that they had seen the accused and the deceased family earlier and during the relevant time. The accused had been known to the various persons including carpenter,P.W.9, P.W.11, labourer, P.W. 13 son of P.W. 11 and P.W. 12, P.W. 37 and P.W. 39 Supervisor. The prosecution has proved beyond doubt and P.W.8, 10,28,29 and 30 have also corroborated that they had seen the accused persons on 16/5/1997 immediately after the incident at relevant time and places. The common persons who knew the accused as well as to the deceased are P.Ws. 1, 2, 3, 6,36, 37, 38 and 39. Their testimonies have remained in-tact. The panchas have proved the prosecution case and respective exhibits in all aspects. All the panchas according to us have supported and duly proved the exhibits. The evidence of the police personals, P.W. 20, to 23 and 34, 50 to 57 have being the investigating officers, according to us, done tremendous job to collect the material and proved the prosecution case beyond reasonable doubt. The doctors, P.Ws. 24 and 25 had, as already noted above, conducted post mortem on the dead bodies. The prosecution therefore, has proved beyond doubt that the death of deceased is homicidal and caused by the various

fatal injuries inflicted by the weapons, as used by the accused and thereby killed the deceased persons, mercilessly and intentionally. They have not even spared the young son and daughter of the deceased. The injuries on the bodies of those victims definitely shows their clear intention to murder all the deceased. The photographer P.W. 41 and 42 have duly proved the photographs, which reflects the scene of offence. Other corroborative evidence, which definitely has supported the prosecution case, about the merciless killing by the accused. The dog handler, P.W. 41 has supported the prosecution.

61. After considering all testimonies of the witnessess referred above and after going through the reasoning given by the learned Judge, according to us also, the prosecution has proved all the links and brought on the record the circumstantial evidences, which are cogent and firm. All these circumstances, definitely pin-point the guilt and guilty mind of all the accused. The cumulative effect of all the circumstances shows that the events brought on the record, left no doubt that the crime had been committed by the accused and no one else. All the circumstances

and evidences are interlinked and connected and have established the guilt of the accused.

62. Another aspect which is also supports the prosecution case is the statements and examination under Section 313 of Cr.P.C. by the accused which supports the prosecution case. Therefore, the findings as well as, reasoning given by the learned Additional Sessions Judge, Pune, of conviction, is within the frame work of law and record. There is no perversity in the reasoning or findings. The order is correct and need no interference.

63. **NO CASE OF DEATH PENALTY :-** So far as sentence of the death penalty to accused no. 3, is concerned, the learned Advocate appearing for the appellant, has relied on A.I.R. 1976, S.C. 2488, State of Orisa V. Brahmananda Nanda; A.I.R. 1979, S.C. 964, Bishnu Deo Shaw V. State of W.B. and A.I.R. 1983, S.C. 296, Manzoor V. State of U.P.; (2000) 10, S.C.C. 315, Mujeeb and another Vs. State of Kerla, and prayed for an acquittal, and he has also prayed to consider that this is not the "rarest of rare case" to impose the death penalty. On the sentences also we have heard,

advocates for the respective parties. After hearing both the parties we are of the view that the State could not point out and satisfy us that the present case is one of the "rarest of rare case" where the 'death penalty' should be confirmed.

64. **MITIGATING CIRCUMSTANCES:-** The ingredients of the "mitigating circumstances" are also supports the case of the defence to the extent that, this is not the "rarest of the rare case" for death penalty. The mitigating circumstances in the present case are; (a) There were no eye witnesses to the incident. (b) The conviction is solely based on the circumstantial evidence. (c) The accused No.1 is absconding, who is the husband of Geetabai accused No.2. (d) The person P.W.11, 12,13 saw from the window only Bhwgwat and no other accused in the flat of the deceased. (c) P.W.12 only saw (A2) Geetabai in the flat and was going towards the flat of the deceased (f) The vital role and or assault only by accused no.3 Sahebrao are missing. (g) No witness, has seen actual assaults on the deceased by these accused or only by accused no. 3Sahebrao. Actual role is uncertain. (h) Young age of accused No.3. (i) No earlier criminal background on the record. (k) may

or may not be the leader of the gang.

65. All these evidence as led corroborates the prosecution case. The recovery of the articles and blood stained clothes and as corroborated by other witnesses, draws only one presumption, as contemplated under section 114 illustration (g) of the Evidence Act, that the accused must have committed the murder while robbing the deceased. Based on this principle, we are also of the view that the appellants had committed the robbery and murder. The recovery of the various articles and the cash from the accused further supports the prosecution case of the robbery, which connects with the facts and circumstances of the case, to the heinous crime. There also remained no doubt that the accused have tried to destroy the evidence by throwing the dead bodies of the daughter and deceased Patil in the drainage. The photographs, as well as, scene of occurrence has duly proved and further corroborates the links, conduct and nature of merciless killing and inflicting injuries by the accused to the deceased. But as stated above in absence of direct eye witnesses it is difficult to come to the positive conclusion that the appellant NO.3 had only committed this heinous crime and

no one else. In the present case as noted above, accused No. 1 is absconding. The possibility of committing the crime by the appellant No.1 cannot be ruled out. But in absence of any positive evidence we are of the view that the cases like this conviction under Section 302 r/w section 449,460, 392 r/w section 34 of Indian Penal Code a maximum punishment of life imprisonment is correct. The imposition of death sentence only to accused No.3 according to us is unacceptable and incorrect.

66. **CONCLUSION :-** In view of this, we are interfering with the order to the extent that the imposition of the death penalty to accused No.3 Saheb @ Navnath Kale is quashed and set aside and the same is altered and he is sentenced to suffer life imprisonment as imposed upon accused No.2 Geetabai. Accused No.3 shall also pay fine of Rs. 1000/- and in default of payment of fine, he shall under go rigorous imprisonment for one year more. The order of conviction against both accused is upheld.

67. The Criminal Appeal No. 888 of 2004 filed on behalf of original accused No.3 is rejected except to

the above extent of modification in sentence. The Criminal Appeal No. 889/2004 filed by accused No.2 is rejected.

68. Both the appeals are disposed of accordingly.

69. The Confirmation Case No.1/2004 is rejected.

70. We quantify the fees to be paid to the advocates appointed for the appellants at Rs. 750/- each for both the appeals.

[V.G. PALSHIKAR, J.]

[ANOOP V. MOHTA, J.]